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In the Supreme Court of the United States

OCTOBER TERM, 1978

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A33) [1] is reported at 583 F.2d 678. The "Interim Report" of the Interstate Commerce Commission (Pet. App. A35-A85) is reported at 349 I.C.C. 411. The final decision of the Commission (Pet. App. A86-A139) is reported at 353 I.C.C. 567.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1978. A petition for rehearing was denied on October 5, 1978 (Pet. App. A34). The petition for a writ of certiorari in No. 78-1049 was filed on December 28, 1978, and the petition in No. 78-1069 was filed on January 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Commission may require a delivering railroad to remit to the owner of a railroad freight car a portion of the demurrage charges the delivering railroad collects from the shipper or receiver.

2. Whether such a remittance of demurrage charges to a shipper that owns its freight cars is a "rebate."

3. Whether the Commission's failure to meet a statutory time limit for concluding an administrative

[1] "Pet. App." refers to the separately bound appendix to the petition in No. 78-1069.

proceeding requires that an otherwise lawful rule promulgated in that proceeding be invalidated.

STATEMENT

Railroads leave freight cars with shippers and receivers of freight for loading and unloading. Shippers and receivers must pay a fixed amount of "demurrage" if they keep the cars beyond an alloted "free time." [2] Traditionally, demurrage payments have been made to and retained by the delivering carrier without regard to whether it owns the freight car. The rule adopted by the Commission in this case (Pet. App. A137-A139) requires that the delivering carrier pass on to the owner of the freight car demurrage payments of more than $10 per car per day.[3]

The rule is part of a continuing attempt by the Commission to remedy the longstanding national shortage of freight cars, a shortage chiefly attributable to the inadequate number of cars owned by the

[2] Until very recently, after two days of "free time" demurrage charges were $10 per day for the first four days, $20 per day for the next two days, and $30 per day after that. *Demurrage Rules*, 340 I.C.C. 83 (1971). On February 1, 1979, these charges were raised to $20, $30 and $60. Suspension Case No. 68867, *Increased Demurrage Charges, Nationwide*, February 1979 (January 31, 1979).

[3] The rule is not yet in effect. The Commission stayed the effectiveness of the rule pending judicial review (Pet. App. A140-A141).

nation's railroads.[4] As part of its effort to encourage the purchase of cars, the Commission initiated this proceeding in 1972 and proposed the following rule (Pet. App. A36):

> The non-owning railroad, on whose lines a car is being detained under demurrage, shall remit to the railroad car owner all demurrage charges collected in excess of $10 per day.

After considering public comment on the proposed rule, the Commission issued an "Interim Report" (Pet. App. A35-A85). The report concluded that the Commission had statutory authority to issue the rule (Pet. App. A39-A41), that the rule should apply to all cars, not only to those owned by railroad companies (Pet. App. A69-A72), and that the rule would not result in illegal rebates from railroads to shippers who own their own cars (Pet. App. A71-A72). The Commission reopened the proceeding to receive additional comment, and it posed specific questions for participants (Pet. App. A81, A83-A85).

During this period, Congress undertook to reform many of the Commission's powers and procedures. In response to a request from the House Committee on Interstate and Foreign Commerce for comments on the bill that was later enacted as the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 (the 4-R Act), the Act-

[4] See *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 230-231 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743-746 (1972); *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184 (1975); see also Pet. App. A12-A13.

ing Chairman of the Commission informed the Committee (Pet. App. A17-A18 n.27, A95):

> The purposes of the [pending demurrage] proposals are to create an added incentive for the car owner to acquire additional cars and to remove any inducement to the non-owner to encourage detention of foreign cars in order to benefit from collection of demurrage charges.

Section 211 of the 4-R Act, 90 Stat. 46, reflects this concern.[5] It amended Section 1(6) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 1(6), to provide:

> Demurrage charges shall be computed [by the ICC], and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.

In explaining Section 211 of the Act, the Conference Committee stated that the provision "requires the Commission to establish rules and regulations for the computation of demurrage charges so that freight car utilization is maximized and car owners receive adequate compensation" (Pet. App. A94).[6]

Relying on Section 211 of the 4-R Act (Pet. App.

[5] This provision is now codified as 49 U.S.C. 10750. See Pub. L. 95-473, 92 Stat. 1337. For purposes of convenience, we refer to the statutes by the designations in effect when the court of appeals rendered its decision.

[6] See also Section 212 of the 4-R Act, 90 Stat. 46, which expresses "the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars."

A90-A96), the Commission adopted the proposed demurrage rule (Pet. App. A137-A139).

The court of appeals affirmed (Pet. App. A3-A33). The court concluded that Section 1(6), as amended by Section 211 of the 4-R Act, gave the Commission adequate authority to adopt the rule (A14-A19), that the Commission's balancing of the benefits and burdens of the new rule was "rationally supported" (Pet. App. A24), and that the rule does not result in illegal rebates (Pet. App. A31-A33). The court rejected an argument that the rule should be set aside because it was not issued within a time limit established by the 4-R Act for certain formal investigative proceedings (Pet. App. A26-A30).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. Petitioners argue (B & O Pet. 6-10) that the Commission has no authority under Section 1(6) to "divide" demurrage revenues by requiring a delivering railroad to remit a portion of those revenues to the railroad car owners. They contend that the Commission's order exceeds its authority to require rail carriers to "compute" demurrage charges.

But, as the court of appeals correctly concluded, "the provision not only directs the ICC to compute demurrage charges * * * but also mandates the agency to establish 'rules and regulations relating to such charges' " (Pet. App. A16). "[W]hile the language of § 1(6) does not specifically authorize remittance to car owners, it is equally clear that the statute does not prohibit such an arrangement" (*ibid.*).

Furthermore, the court correctly concluded that the legislative history of the 4-R Act fully supports the Commission's interpretation of Section 1(6). Congress was aware of the Commission's proposed demurrage rule and did not disapprove it (Pet. App. A17). The Conference Report reflects an understanding that the Commission would be required to establish rules to ensure that "car owners receive adequate compensation." H.R. Rep. No. 94-781, 94th Cong., 2d Sess. 135 (1976).[7] This rule has done just that.

2. Petitioners argue (B & O Pet. 12-13; A & S Pet. 6-12) that remittance of demurrage charges to shipper-owners amounts to rebates to shippers that are illegal under Section 1 of the Elkins Act, 49 U.S.C. (1976 ed.) 41(1) (which prohibits transportation service at less than the tariff rates)[8] and Section 15(15) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 15(15) (which authorizes carriers to establish a tariff charge or allowance applicable when a shipper furnishes a freight car).[9] The court of appeals correctly answered this contention (Pet. App. A31-A32):

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[7] Although the court of appeals found it unnecessary to consider other sources of the Commission's authority to issue the demurrage rule (Pet. App. A14 n.17), both the Commission's interim report and its final report relied on several statutory provisions that predated the 4-R Act (Pet. App. A39-A41, A95, A128).

[8] This provision now is codified as 49 U.S.C. 11903.

[9] This provision now is codified as 49 U.S.C. 10747.

> [P]etitioners have misconstrued the purposes of § 15(15) and § 41(1), as well as the concept of demurrage. Sections 15(15) and 41(1) were designed to ensure reasonable and nondiscriminatory rates and charges, and to prevent any type of departure from published transportation rates. In contrast, the essential nature of demurrage is that of a car service regulation. Consequently, we do not believe that a demurrage charge can properly be understood as a "rate" under § 41(1), or as a "charge" as that term is used in § 15(15). Unlike the use of the terms in those provisions, demurrage remittance relates not to rail carriers' property, but to excessive delay caused by the shipper or receiver in the loading or unloading of freight cars. Furthermore, it is neither a "charge and allowance" paid by the railroads for use of freight cars nor a reduction of the railroads' rates for owner-shippers. Rather, demurrage is a cost imposed upon the receiver, the penalty portion of which will be transmitted to the owner by the delivering carrier.

Although petitioners take issue (B & O Pet. 12-13; A & S Pet. 6-8) with the court's characterization of demurrage as a regulation of car service, there is nothing novel in the court's holding. It follows the principle, long settled by decisions of this Court and the lower federal courts, that demurrage charges are unique, neither "rates" nor "penalties" in the conventional sense, but "an integral part of the established rules and regulations relating to the use and movement of cars." *Iversen* v. *United States*, 63 F. Supp. 1001, 1005 (D. D.C.) (three-judge court),

aff'd, 327 U.S. 767 (1946). See *Pennsylvania R.R.* v. *Kittanning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920); *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184, 190 (1975).[10] The demurrage charges established by the Commission have none of the evils of rebates. They simply discourage undue delay in returning cars and, by increasing the economic returns to car owners, make cars a more attractive investment. They do not prefer one class of shippers over another; they treat all car owners equally. And the rules require payment only in the event lengthy delay actually takes place. Whatever the charges may be called, Congress did not prohibit them.

3. Former Section 17(14)(b) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 17(14)(b)—a provision added by Section 303(b) of the 4-R Act—directed the Commission to conclude, by February 1977, all formal rail investigative proceedings that had been pending for at least three years when the Rail Act was adopted. Petitioners contend (B & O Pet. 10-11) that the Commission's demurrage rule proceeding was within that class and, because the proceeding was not concluded until April 1977, the resulting rule should be invalidated.

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[10] Petitioners' contention (A & S Pet. 6-12) that the decision below violates the doctrine of *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), is frivolous. Petitioners made their rebate argument to the Commission (Pet. App. A53), which rejected it (Pet. App. A71-A72, A125). Petitioners renewed their argument in the court of appeals, which also rejected it. *Chenery* prohibits a court from substituting its own grounds for those of the agency in reviewing agency action, but that did not occur here.

In our view, this proceeding was not within the statutory class because it was not a "formal investigative proceeding" and because the 1975 notice of amended rulemaking effectively instituted a new proceeding that had not been pending for three years on the date the 4-R Act was passed.

At all events, although the court of appeals held that the time limit applies to this proceeding (Pet. App. A26-A29), it correctly concluded that the Commission's failure to meet the statutory deadline did not invalidate the otherwise lawful rule. Congress provided in Section 17(14)(a)—which imposes a time limit on proceedings begun *after* the Rail Act became effective—that any such proceeding which is not timely concluded "shall automatically be dismissed."[11] The absence of a similar sanction—or indeed any sanction at all—in Section 17(14)(b) strongly suggests that Congress did not intend to invalidate otherwise lawful rules issued in proceedings begun before passage of the 4-R Act. Congressional oversight, rather than judicial review, is the mechanism contemplated for ensuring compliance with the deadline imposed by former Section 17(14)(b). Congress omitted Section 17(14)(b) from the recodification of the Interstate Commerce Act because that tion of the Interstate Commerce Act because that section was, in Congress' view, "executed."[12] Congress has thus determined that its directive in Section 17

[11] Section 17(14)(a) is now codified as 49 U.S.C. 11701(c).

[12] H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 247 (1978).

(14)(b) is no longer necessary, and there is no reason for this Court to revive it.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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